

**COURT OF APPEALS
DECISION
DATED AND FILED**

January 23, 2013

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

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A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2011AP2699

Cir. Ct. No. 2008CI1

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

IN RE THE COMMITMENT OF ERIC A. KERSCHER:

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

ERIC A. KERSCHER,

RESPONDENT-APPELLANT.

APPEAL from orders of the circuit court for Calumet County:
ROBERT J. WIRTZ, Judge. *Affirmed.*

Before Brown, C.J., Neubauer, P.J., and Gundrum, J.

¶1 PER CURIAM. Eric A. Kerscher appeals from an order committing him as a sexually violent person under WIS. STAT. ch. 980 (2009-10)¹ and an order

¹ All references to the Wisconsin Statutes are to the 2009-10 version.

denying his motion for postcommitment relief. Kerscher contends that he is entitled to a new trial based on ineffective assistance of counsel. We reject Kerscher's claim and affirm the orders.

¶2 In January 2008, the State filed a petition alleging that Kerscher was a sexually violent person. After a three-day trial, a jury found Kerscher to be a sexually violent person and the circuit court committed him pursuant to WIS. STAT. ch. 980.

¶3 Kerscher subsequently filed a motion for postcommitment relief. In it, he argued that his trial counsel, Attorney Erik Loy, was ineffective for introducing and failing to object to evidence of the End of Commitment Review Board's (ECRB) precommitment screening process, contrary to *State v. Budd*, 2007 WI App 245, 306 Wis. 2d 167, 742 N.W.2d 887.

¶4 Following a hearing on the matter, the circuit court denied Kerscher's motion. The court determined that Attorney Loy's performance was not deficient for two reasons: (1) Loy used the ECRB evidence in a strategic manner to point out a perceived flaw in the state experts' application of an actuarial instrument and (2) that use was distinguishable from how the information was improperly presented in *Budd*. The court also determined that Kerscher was not prejudiced by the introduction of the ECRB evidence. This appeal follows.

¶5 On appeal, Kerscher renews his claim of ineffective assistance of counsel. A claim of ineffective assistance of counsel presents a mixed question of law and fact. *Strickland v. Washington*, 466 U.S. 668, 698 (1984). We affirm the circuit court's findings of fact unless they are clearly erroneous. *State v. Pitsch*, 124 Wis. 2d 628, 634, 369 N.W.2d 711 (1985). However, whether counsel's

conduct amounted to ineffective assistance is a question of law which we review de novo. *See id.*

¶6 To establish a claim of ineffective assistance of counsel, a defendant must show both that counsel's performance was deficient and that such performance prejudiced the defense. *Strickland*, 466 U.S. at 687. This court need not address both components of the inquiry if the defendant does not make a sufficient showing on one. *Id.* at 697.

¶7 Here, Kerscher's claim of ineffective assistance of counsel stems from the introduction of ECRB evidence at two points during trial. The first was when Loy prompted it from state expert Dr. Christopher Snyder on cross-examination. The second was when Prosecutor Kevin Greene discussed it in his closing argument without objection from Loy. The context and content of those references are described in greater detail below.

¶8 Snyder was one of two state experts to testify at trial. He testified that Kerscher suffered from a mental disorder that predisposed him to engage in acts of sexual violence. He further testified that Kerscher was more likely than not to reoffend in the future. Snyder based this conclusion on Kerscher's history and the application of actuarial instruments, including the Static-99R, designed to help evaluators estimate a sex offender's risk of re-offense.

¶9 According to Dr. Lori Pierquet, the other state expert witness, an examiner using the Static-99R assigns the examinee a score on a scale from negative 3 to positive 12 based on factors in that person's history. The examiner then compares that score to the reconviction rates of a subgroup of sex offenders with the same score. Snyder explained that the Static-99R consisted of four

subgroups based on certain characteristics. Correspondingly, each subgroup had a different base reconviction rate associated with it.

¶10 Snyder noted that in other kinds of settings, it was not always possible to match an examinee with a subgroup when applying the Static-99R. However, in the case of examinees undergoing sexually violent proceedings, the developers of the Static-99R recommended that evaluators apply that examinee's score to the so-called high-risk/high treatment needs subgroup ("high-risk/needs group").

¶11 Thus, when evaluating Kerscher, Snyder compared his score on the Static-99R to the subgroup of sex offenders in the high-risk/needs group. Snyder believed this was appropriate based on the Static-99R developers' recommendation as well as the fact that Kerscher had "gone through a very stringent preselection process" to be considered for commitment.

¶12 On cross-examination, Loy pressed Snyder on this point. He asked Snyder whether it was circular reasoning or "loading the dice" to assume that a person who has gone through the ECRB screening process was comparable to "high-risk" individuals when evaluators are trying to assess whether the person was high risk in the first instance. During this line of questioning, Loy asked Snyder about the ECRB's preselection process.

¶13 In response, Snyder explained that the ECRB reviews all sex offenders when their release dates approach. The ECRB first determines if an offender was serving time for a sexually violent offense, a step that eliminates a large number of offenders. For an offender who satisfies that criterion, the ECRB reviews other factors, such as whether the offense was first-time or repeated, whether it involved children or family members, etc. If the ECRB concludes that,

based on those factors, the offender could meet the criteria for commitment under WIS. STAT. ch. 980, it refers the offender to the forensic unit for an evaluation.

¶14 The forensic unit team then evaluates the offender and, depending on the evaluator's assessment, the person may be referred for a WIS. STAT. ch. 980 hearing and further evaluations. Snyder testified that the ECRB refers only twenty percent of the offenders they review to the forensic unit, and that the forensic unit in turn refers only twenty percent of that group onward from there. Thus, in all, the screening process eliminates ninety-five percent of people coming out of prison for sex offenses.

¶15 No additional express mention of the details of the ECRB screening process was made in the hearing. Nonetheless, Kerscher appears to take issue with two comments made by Greene in closing argument. First, Greene reiterated Snyder's reasons for applying Kerscher's Static-99R score to the high-risk/needs group, noting that "if you group the individuals by those who are preselected for risk, you end up in this high risk/high needs category" that the developers recommended for persons subject to WIS. STAT. ch. 980 proceedings. Second, Greene remarked that, based on Snyder's testimony, it was unclear whether the ECRB used the Static-99R in its screening process.

¶16 As noted, the circuit court concluded that Loy's decision to use the ECRB evidence at trial was strategic, not deficient. The record supports this determination. To begin, the content and context of Snyder's testimony support the conclusion that Loy used the ECRB evidence to point out a perceived flaw in the state experts' application of the Static-99R. Moreover, Loy admitted to as much at the hearing on Kerscher's postcommitment motion. There, he explained that he introduced the ECRB evidence to convince the jury that the State was

inflating Kerscher's risk of re-offense, and the information helped illustrate his theory that the experts were illogically assuming Kerscher to be high risk in order to determine whether he was high risk. This was not an unreasonable strategy.

¶17 In addition, we conclude that Loy was not deficient for failing to object to Greene's references to the ECRB in closing argument. As noted by the State, Greene's statements were vague references that did no more than acknowledge the existence of the screening process and its relation to how experts are to apply the Static-99R. There was nothing objectionable about them. Furthermore, Greene was simply referencing general information to rebut Loy's valid defense tactic. By objecting to that, Loy would have risked losing credibility for objecting to the very evidence that he introduced. He also would have called further attention to the ECRB evidence.

¶18 Finally, contrary to Kerscher's assertion, we are not persuaded that the use of ECRB evidence in this case ran afoul of *Budd*. In *Budd*, the state expert witness testified in detail about the ECRB screening process for selecting sex offenders for WIS. STAT. ch. 980 proceedings. *Budd*, 306 Wis. 2d 167, ¶4. She explained that, based on the screening process, Budd was among only 4.5 percent of sex offenders selected for WIS. STAT. ch. 980 proceedings. *Id.*, ¶18. This court concluded that such testimony was irrelevant because it did not explain why Budd or anyone else was selected for WIS. STAT. ch. 980 proceedings while others were not. *Id.*, ¶16. We also concluded that the testimony was sufficiently harmful to warrant a new trial. *Id.*, ¶18.

¶19 Unlike the circumstances in *Budd*, the details of the ECRB screening process were not advanced offensively by the State to persuade the jury that Kerscher was a sexually violent person based on that screening. Rather, those

details were introduced strategically by the defense to explain its theory that the state expert witnesses had misused the screening information when applying the Static-99R to Kerscher. Accordingly, the circuit court correctly distinguished this case from *Budd* based on the manner in which the ECRB evidence was used.

¶20 For the reasons stated, it cannot be said that Loy performed deficiently by introducing and failing to object to the ECRB evidence. Accordingly, we affirm the orders of the circuit court.

By the Court.—Orders affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5.

